



International Tribunal for the Prosecution of
Persons Responsible for Serious Violations of
International Humanitarian Law Committed in the
Territory of the former Yugoslavia since 1991

Case No: IT-08-91-T
Date: 29 March 2012
Original: English

IN TRIAL CHAMBER II

Before: Judge Burton Hall, Presiding
Judge Guy Delvoie
Judge Frederik Harhoff

Registrar: Mr. John Hocking

Decision of: 29 March 2012

PROSECUTOR

v.

MİĆO STANIŠIĆ AND STOJAN ŽUPLJANIN

PUBLIC

**DECISION GRANTING IN PART PROSECUTION'S
MOTION TO RECONSIDER THE TRIAL CHAMBER'S
DECISION OF 27 JANUARY 2012 AND TO ADD
FURTHER MATERIAL TO THE CHS**

The Office of the Prosecutor

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Counsel for the Accused

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TRIAL CHAMBER II (“Trial Chamber”) of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Tribunal”);

BEING SEISED OF “Prosecution’s Motion for reconsideration in part of the Trial Chamber’s Decision of 27 January 2012 and to add further documents to the CHS, and notice of compliance with the Trial Chamber’s order of 27 January 2012” filed on 6 February 2012 (“Motion”);

RECALLING that the Consolidated Hyperlinked Spreadsheet (“CHS”) is a tool which structures and makes accessible all of the Prosecution’s evidence with regard to each alleged victim of the killings charged in the Indictment;

RECALLING that basically the CHS has two components: the names and other identifying elements of alleged victims on the one hand, and document numbers and/or hyperlinks to documents purportedly showing the circumstances under which the alleged victims were killed on the other;

NOTING that on 6 February 2012, the Prosecution complied with the Decision of 27 January 2012, but additionally requested reconsideration of the denial of admission into evidence of ten documents, and sought leave to add further documents to the CHS (“Additional Material”);¹

NOTING that the Prosecution therefore filed two versions of the CHS on 6 February 2012: one containing all CHS related material admitted by the Trial Chamber up to and including the Decision of 27 January 2012 (“Version 1”); and another, including the ten documents and the Additional Material (“Version 2”), which it seeks to have admitted into evidence as the final version of the CHS;²

NOTING that with regard to Version 1, the Prosecution has reviewed the spelling of victim names, provided additional information identifying previously unknown first names of alleged victims, made further references to exhibits, removed the names of 30 alleged victims from the CHS, and added two further names to the CHS which in its view should have been listed in it;³

NOTING that in support of its Motion, the Prosecution argues that:

¹ Motion, paras 1-3, 24, 32; See Annexes A and B; The Additional Material is listed in Annex D to the Motion. The Prosecution further requested leave to exceed the word limit in the Motion; Second Decision admitting into evidence documents supplementing the CHS, 27 January 2012 (“Decision of 27 January 2012”).

² Motion, para. 32. Version 1 of the CHS is attached as Annex A, and Version 2 as Annex C to the Motion.

³ *Ibid.*, paras 26-28.

- (i) this matter has a long procedural history and that it only became evident on 2 December 2010 that there would be no agreement with the Defence regarding the exhumation evidence, and that as a result, the Prosecution only then sought to obtain additional documentation to supplement the CHS;⁴
- (ii) the Trial Chamber was aware that evidence collection concerning alleged victims may be conducted on an on-going basis;⁵
- (iii) this is not a case in which the Prosecution must prove the deaths of each victim beyond a reasonable doubt, but that the identities of the victims serve to assist the Defence in challenging material facts that the Prosecution must prove beyond a reasonable doubt;⁶
- (iv) the duty to provide the further material stems from the Prosecution's notice obligation;⁷
- (v) the request for assistance ("RFA") with respect to the ten documents was not made earlier because the Prosecution already had some evidence in relation to the victims concerned by the ten documents, and the Prosecution had to prioritise other requests;⁸
- (vi) the Additional Material emanates from sources not previously relied on in the CHS, but rather is a result of extensive searches conducted by the Prosecution in its collections;⁹

NOTING that in the Response,¹⁰ the Defence submits that:

- (i) the request for reconsideration should be denied as the ten documents relate to individuals who were listed in the original CHS filed on 23 July 2010, and that the Prosecution therefore had over a year to make the RFA in respect of these individuals;¹¹
- (ii) the Prosecution failed to demonstrate a clear error of reasoning and a resulting injustice stemming from the Decision of 27 January 2012, that the Trial Chamber gave the Prosecution every opportunity to prepare and file the final version of the CHS by 6

⁴ *Ibid.*, paras 5-7, 19.

⁵ *Ibid.*, paras 8-10, 21.

⁶ *Ibid.*, para. 15.

⁷ *Ibid.*, para. 16.

⁸ *Ibid.*, para. 18.

⁹ *Ibid.*, para. 31.

¹⁰ Stanišić Defence opposition to Prosecution's Motion for reconsideration in part of the Trial Chamber's Decision of 27 January 2012 and to add further documents to the CHS, 14 February 2012 ("Response"); Župljanin Defence joined to this submission, *see* Župljanin Defence notice regarding Prosecution's Motion for reconsideration in part of the Trial Chamber's Decision of 27 January 2012 and to add further documents to the CHS, 15 February 2012.

¹¹ Response, para. 2.

February 2012, and that at this late stage of the proceedings the CHS should be finalised;¹²

- (iii) in Stanišić's Supplemental Pre-Trial Brief of 31 July 2009, it had informed the Prosecution that it contested the truth and accuracy of all factual allegations made by the Prosecution, and not relatively late in the case as submitted by the Prosecution;¹³
- (iv) the Additional Material should not be added to the CHS as this material was in Prosecution's possession for years, and as the material includes witness statements never previously disclosed to the Defence and admission of those would circumvent the rules applicable to the admission of witness statements;¹⁴
- (v) adding new names to the CHS would unfairly prejudice the Defence as the Defence case is closed and it has no opportunity to challenge them, and that adding names to the schedule of the Indictment at this stage amounts to insufficient and untimely notice of crimes;¹⁵
- (vi) many changes to Version 1 of the CHS show that the Prosecution has failed to exercise reasonable diligence with regard to this issue, and as a result, has prejudiced the Defence in terms of time and resources;¹⁶
- (vii) the additional information identifying a previously unknown first name of an alleged victim amounts to addition of new names to the CHS, thereby necessitating a review of documents listed for those alleged victims;¹⁷

NOTING that on 15 February 2012, the Prosecution sought leave to reply and filed the Reply in which it submits that:

- (i) the Stanišić Supplemental Pre-Trial Brief and a number of Defence statements on 17 September 2010 did not put the Prosecution on sufficient notice of the Defence challenge in relation to the individually named alleged victims;¹⁸

¹² *Ibid.*, para. 4.

¹³ *Ibid.*, para. 5.

¹⁴ *Ibid.*, paras 8-9, 14.

¹⁵ *Ibid.*, para. 10.

¹⁶ *Ibid.*, paras 11-18.

¹⁷ *Ibid.*, para. 16. The Trial Chamber understands this submission to have been made in the context of the amount of additional work for the Defence caused by certain corrections made by the Prosecution to the CHS, and not as an argument that these corrections are an untimely notice of crimes that was made in respect of the Prosecution's request to add an additional name to the CHS.

- (ii) it made further corrections to the CHS, and that it would therefore provide the Trial Chamber and the Defence with a further version of the CHS;¹⁹

NOTING that on 27 February 2012, the Prosecution notified the Trial Chamber and the Defence that due to a clerical error it inadvertently removed a number of names from the CHS, that it withdrew the request with respect to one of the two names it sought to add to the CHS in the Motion, and that it would provide amended versions of the annex to the Indictment and the CHS once the Trial Chamber ruled on the Motion;²⁰

RECALLING that a Chamber has the discretionary power to reconsider its previous decision if a clear error of reasoning has been demonstrated or if particular circumstances justify reconsideration in order to prevent an injustice; and that “particular circumstances” can include new facts or new arguments;²¹

RECALLING that in its Decision of 1 February 2011 the Trial Chamber, first, granted the addition of the CHS and the underlying material to the Prosecution’s Rule 65*ter* exhibit list, and, second, admitted the CHS and the underlying material into evidence;²²

RECALLING that the Trial Chamber’s finding that “it is to be expected that evidence collection (...) may be conducted on an on-going basis” was made with regard to the first of those two steps, in support of the ruling that “the Prosecution is not required to disclose all victim-related material ‘prior to filing its indictment’ as asserted by the Defence”;²³

CONSIDERING that the Trial Chamber did not intend, in any of its previous Decisions concerning the CHS, to allow for inclusion of additional material supplementing the CHS after the closure of the Prosecution’s case-in-chief on 1 February 2011, unless such additional information had either

¹⁸ Prosecution’s Motion seeking leave to reply and proposed reply to Defence response to Prosecution’s motion for reconsideration in part of the Trial Chamber’s Decision of 27 January 2012 and to add further documents to the CHS, 15 February 2012 (“Reply”), paras 3-8.

¹⁹ Reply, paras 9-10.

²⁰ Prosecution’s Corrigendum to the Prosecution’s motion for reconsideration in part of the Trial Chamber’s Decision of 27 January 2012 and to add further documents to the CHS, and notice of compliance with the Trial Chamber’s order of 27 January 2012, 27 February 2012 (“Corrigendum”), paras 3-8.

²¹ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.16, Decision on Jadranko Prlić’s Interlocutory Appeal against the Decision on Prlić Defence Motion for Reconsideration of the Decision and Admission of Documentary Evidence, 3 November 2009, para. 18.

²² Decision granting Prosecution’s motion on proof of death database, 1 February 2011 (“Decision of 1 February 2011”), para. 59.

²³ Decision of 1 February 2011, para. 46.

been requested by the Prosecution from the depository or already admitted into evidence by the Trial Chamber before that date;²⁴

CONSIDERING that the Prosecution has not demonstrated a clear error of reasoning in the Decision of 27 January 2012, and that there are no particular circumstances which justify reconsideration of that Decision in order to prevent an injustice;

CONSIDERING that the one name that the Prosecution now seeks to add to the CHS has been part of the trial record since 26 November 2009 when Exhibit P411.32 listing the potential victims of the alleged suffocation of prisoners during the transfer from Betonirka to Manjača was admitted into evidence, and that therefore the addition of this name to the CHS does not amount to the admission of new evidence after the close of the case-in-chief and serves only the purpose of structuring and making accessible the already admitted evidence with regard to this alleged victim;²⁵

CONSIDERING that because of the nature of the crimes alleged in this case and the fact that the Defence will have the opportunity to make submissions on the CHS, the addition of one further name to Schedule B of the Indictment will not be prejudicial to the Defence;

CONSIDERING that because the Additional Material came to light following renewed searches of the Prosecution's data collections and was not requested by the Prosecution before the closure of its case-in-chief or already admitted into evidence by the Trial Chamber before that date, the Prosecution's request to add the Additional Material to the final version of the CHS will be denied;

CONSIDERING that the corrections made by the Prosecution to Version 1 of the CHS such as the revision of the spelling of victim names, additional information identifying previously unknown first names of alleged victims, further references to exhibits, the removal of the names of 30 alleged victims from the CHS, and the reinstatement of four names, were necessary to ensure the accuracy of the CHS, and that the extension of time granted to the Defence to file its submission on the CHS will have remedied any additional work the Defence may have had to perform as a result of these corrections;

For the reasons set out above, the Trial Chamber:

GRANTS the Prosecution's request to exceed the word limit in the Motion;

GRANTS the Prosecution leave to reply to the Response;

²⁴ Decision admitting into evidence documents supplementing the CHS, 25 November 2011, para. 28; Decision of 27 January 2011, para. 9.

²⁵ See Indictment, Schedule B, under 1.1; See Hearing of 26 November 2009, T. 3918-3922.

GRANTS the Motion in part;

DENIES the Prosecution's request for reconsideration of the Decision of 27 January 2012 and to admit into evidence the Additional Material and Version 2 of the CHS;

ORDERS the Prosecution to file, by 5 April 2012, the final and complete version of the CHS, based on Version 1 of the CHS filed as confidential Annex A to the Motion, incorporating:

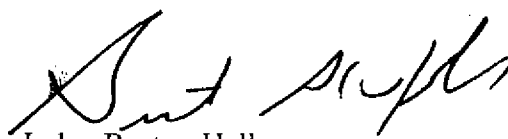
- (i) the corrections identified by the Prosecution since then, including those mentioned in paragraphs 26 and 27 of the Motion, paragraph 9 of the Reply, and paragraphs 2 through 4 of the Corrigendum, and
- (ii) the addition of one further name to the CHS as requested in paragraph 28 of the Motion and modified in paragraph 4 of the Corrigendum;

ORDERS the Prosecution to file, by 5 April 2012, an updated public annex to the Indictment listing all known alleged victims of killings listed in Schedules A and B of the Indictment by municipality and per alleged incident, which shall thereafter replace the current annex filed as Annex B to the Motion;

DIRECTS the Registry to assign an exhibit number to the CHS filed by the Prosecution pursuant to this Decision;

INVITES the Defence to file, by 12 April 2012, its objections in respect of each individual listed in the CHS.

Done in English and French, the English version being authoritative.


Judge Burton Hall
Presiding

Dated this 29th day of March 2012
At The Hague
The Netherlands

[Seal of the Tribunal]